NO. 05-846

IN THE

Supreme Court of the United States

BJY, Inc. and Gregg W. Young,

Petitioners,

-versus-

MAMDOUH EL-HAKEM,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petition for Writ of Certiorari

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Question Presented for Review

Respondent, Mandouh El-Hakin asserted a race discrimination claim under 42 U.S.C. § 1981 against his employer, BJY, Inc. and its CEO Gregg W. Young for referring to him as "Manny" in weekly phone conversations and e-mails occurring over a period of two months. Respondent testified that he objected to the use of this "nick name" was contrary to his wishes religion and heritage.

Issue 1

Does the utilization of a racially neutral nickname "Manny" for the name "Mandouh" constitute race discrimination and violate 42 U.S.C. § 1981?

Issue 2

Does an employer's use of a nickname over the religious objections of its employee create a racially hostile work environment resulting in civil liability under 42 U.S.C.§ 1981?

List of Parties to the Proceeding

The following is a list of all parties to the proceeding in the court whose judgment is sought to be reviewed, and a list of parent companies and nonwholly owned subsidiaries as required by Rule 29.6.

Gregg W. Young

BJY, Inc. BJY, Inc. has no parent company and no publically held company holds 10% or more of the corporation's stock.

Mamdouh El- Hakim

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41 U.S.C. § 1981a	passim
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Citations of Official and Unofficial Reports of the Opinions and Orders

The opinion of the 9th Circuit and is published El-Hakem v. BJY Inc. et al., Nos. 03-35514, 03-35544 and 03-35063, 2005 WL 1692470 (9th Cir. July 21, 2005)

The opinion of the district court is published.

Statement of the Basis for Jurisdiction

The judgment of the Court of Appeals was filed July 21, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved

This case involves 41 U.S.C. Section 1981a which provides:

> Statement of equal rights
>
> (a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

Statement of the Case

This is an appeal of a judgment involving a claim that appellant BJY and its chief executive officer, Mr. Young, created a racially hostile work environment by referring to plaintiff by the nickname "Manny" instead of his given name "Mamdouh."

Mamdough El-Hakem was born and raised in Egypt. (Reporters Record. at p. 95). He was educated as an engineer. (Id). He is a Muslim practicing Islam. (Reporters Record at p. 96). He later obtained Canadian citizenship and came to the United States to work under the provision of NAFTA under a TN VISA. (Reporters Record at p. 107). In September of 1998, He went to work for Appellant, BJY as a structural plan examiner. (Reporter's Record at p. 109). In May of 1999, El Hakem began to work for Appellant, BJY, Inc. ("BJY"). (Reporter's Record at p. 388).

BJY's CEO was Gregg Young. Mr. Young officed in Austin, Texas. (Reporter's Record at 643). There were no face to face meetings between Mr. Young and Mamdough El-Hakem. Phone and e-mail contact was infrequent. (Reporter's record p. 146). The focus of Mr. El-Hakem's complaint was the alleged suggestion by Mr. Young that Mr. El-Hakem go by the nickname "Manny" described as a more "Western Name" or a name easier for BJY clients to pronounce. Mr. El-Hakem apparently was offended because he was advised by his

friend, Wadj Said the name was Jewish, and that conclusion gave rise to bad feelings.

> He did tell me th is boss had given him a Manny name, and I smiled and I told him, "There is a great Jewish rabbi in town. His name is Emanuel Roze, and his nickname is Manny."
>
> Q. Did Mr. El-Hakem express any concern about the name Manny specifically?
>
> A. Yes. I mean, you know, he started to know that this is, you know, a name that he doesn't accept, is not appropriate. We have to remember that he came from an Egyptian society. There was a conflict at one time between Egypt and Israel. There was a conflict, you know, a major conflict, that both sides have lost a lot of innocents and civilians.

(Testimony of Waja Said Reporters Record at p. 7). Mr. El Hakem did not communicate to Mr. Young or anyone at BJY that he was offended because he perceived the name to be Jewish. He did testify he objected on religious grounds, but Mr. Young continued to refer to Mr. El Hakem as "Manny" despite this objection. Mr. El Hakem's claim of a hostile race environment was grounded solely in these phone and e-mail discussions as to the use of a nickname "Manny." As the issue on appeal is whether "a hostile race environment" existed, Mr. El Hakem's description of these discussion of the conversation follows.

Mr. El Hakem described the first discussion with Mr. Young as follows:

> A. During this conference [phone] call, for the first time I heard Mr. Young calling me Manny, and was -- was a different way of pronunciation. And the way he pronounce it, it's really, I felt -- I shocked. I didn't expect to hear this name, and even the way he -- he said it. So I object and I corrected him and I said, "My name is Mamdouh, and it's pronounced Mamdouh, and I want you to call me Mamdouh. My name means things to me. It is part of my entity. It is part of my personality. It is my name. I carry it for 44 years. And it's part of my religion, and I need to be used and called by the name Mamdouh, which is the name I'm given by my parents."

(Reporter's Record 137-38). The second phone conversation that Mr. El Hakem had with Mr. Young, involved Mr. El Hakem's promotion to office manager, was described by Mr. El Hakem as follows:

> Q. Okay. After the Monday marketing meeting, did you have a second conversation with Mr. Young?
>
> A. Yes, I did.
>
> Q. And was that in another marketing meeting or just individually on the telephone?
>
> A. I got an individual telephone call from Mr. Young directly, and he start talking to me about that "You are getting an opportunity to be a manager of one of the offices and manage

this office. And to be successful and for the client to accept you, it's better to use a Western nickname." And he return and suggest to use Manny, and I object this, and we have another discussion about it.

Q. Now, Mr. El-Hakem, as I understand your testimony, the telephone conversation with Mr. Young dealt with the Western name that he was proposing for you, correct?

A. Yes.

Q. And you responded by explaining again that it was contrary to your wishes, religion, and heritage; is that right?

A. Yes.

Q. Is that where the telephone conversation ended?

A. Yes.

(Reporters Record 142). Mr. El Hakem testified the next communication between Mr. El Hakem and Mr. Young was by Email.

Q. And did you get a further reply in a chain of e-mails?

A. Yes. I got a reply for the same e-mail, from Mr. Young. He keep on pushing me to accept a Western name, but I object. I replied, objecting this and suggesting in this stage to use my last name, which is Hakem, as -- as a name, dealing with the clients.

Q. Okay. And so did you get a reply to that suggestion from Mr. Young?

A. Mr. Young replied to me, proposing using Hank as a Western name, Western nickname, and I object that.

Q. What did you do after you received the e-mail suggesting Hank?

A. I went to the dictionary and I open the dictionary. I looked for the meaning of Hank, and I found Hank. It doesn't mean anything. It's just a word.

(Reporters Record 144-45). After the e-mail, the contact between Mr. Young and Mr. El Hakem did not communicate directly.

Q. Okay. Did you talk on the telephone with Mr. Young after that concerning the use of anything other than your name, Mamdouh?

A. I -- after that, I notice that Mr. Young start not communicating to me and start back -- and start putting Mr. Skip Nelson as a contact person in front of me.

(Reporters Record at p. 146). In summary, Mr. El Hakem testified that he "heard the name Manny" during the Monday phone conference marketing meetings for about two months.

Q. Now, can you give me some estimate of how often you heard the name Manny referred to you while you were employed there from May

1999 onward?

> A. Shortly after Mr. Stember left the company, because I have to attend this Monday marketing meeting, at least I hear it once during this Monday marketing meeting, at least when Mr. Young calling me, "What about Portland, Manny?" He want me to talk about the work here. So it's at least once a week during this Monday marketing meeting, plus maybe if it comes through the e-mails. But as a contact -- as a direct contact, that's once a week for around two months.

(Reporters Record at p. 157).

As a structural plans examiner in Oregon, Mr. El Hakem knew he need to be licensed. (Reporters Record at p. 114). While working for BJY, Mr. El Hakem sat for and failed the examination to become licensed as a structural plans examiner. (Reporters Record at p. 258-59). Within two weeks of failing the Exam, Mr. El Hakem was terminated, and the BJY Portland office was closed. (Reporters Record at p. 419-20). The discrimination complaints and this lawsuit followed.

The jury determined Young created a racially hostile work environment, and awarded $15,000 in actual damages and $15,000 in exemplary damages. The jury determined that BJY did not create a racially hostile work enviornment. Upon post-trial motion, the court disregarded the jury's finding that BJY did not create a racially hostile work environment and entered an amended judgment holding BJY

and Young jointly and severally liable for the $30,000.00.

The case was appealed to the Ninth Circuit Court of Appeals. It affirmed.

Basis of Federal Jurisdiction in the First Instance

The basis of jurisdiction in the first instance was diversity of citizenship under 28 U.S.C. § 1332 and and federal question jurisdiction concerning 41U.S.C. 1981.

Argument for Allowance of Writ

The narrow issue raised by this Petition is whether the reference to an Egyptian born person by a nickname "Manny" as opposed to his given name "Mandouh" by phone and e-mail in a work setting evidences a racially hostile work environment giving rise to civil liability to the individual and employer. The Ninth Circuit holds that this conduct, although not severe,[1] is sufficient to create a Civil Rights violation. The net effect of this opinion is the imposition of a civility code[2] that has far reaching application to other fact patterns and settings.[3]

To be actionable under § 1981, harassment must be: (1)based on race; (2) subjectively and objectively hostile; and

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1. Slip Opinion Footnote 1.

2. This Court has specifically held civil rights statutes are not civility codes. Faragher v. City of Boca Raton, 524 U.S. 775, 788, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998).

3. Nicknames are often used in numerous contexts including education, business, politics, and athletics. George W. Bush referred to the former FEMA director as "Brownie."

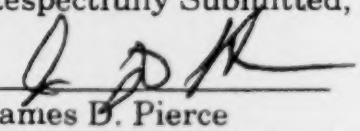
(3) sufficiently severe or pervasive to interfere with an employee's ability to perform his assigned duties. Hrobowski v. Worthington Steel Co. & Worthington Industries Inc., 358F.3d 473, 476 (7th Cir. 2004). Under the objective hostility analysis, courts may consider: (1) the frequency of the conduct; (2) the severity of the conduct; (3) "whether it is physically threatening or humiliating, or a mere offensive utterance"; and (4) whether it unreasonably interferes withthe employee's ability to complete his or her assigned duties. Harris v. Forklift System, Inc., 510 U.S. 17, 23 (1993).

This case involves the use of a "nickname" which objectively is not racial in a context where conduct was admitted to be "non-severe." The conduct simply does not support a 42 U.S.C. § 1981 claim for race discrimination. The Ninth Court of Appeals applied a purely subjective standard the net effect of which would open the door for claims in numerous contexts by persons treated uncivilly who can cite the Ninth Circuit and claim that the uncivil or "politically incorrect" treatment was on account of race.

Conclusion

Petitioners pray that the Court reverse and vacate the judgment of the District Court, instruct it to dismiss the Respondent's 42 U.S.C. Section 1981 claims and for such other and further relief as is just.

Respectfully Submitted,



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Appendix 1

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Mamdouh El Hakim
vs. **No. 03-35514**
BJY, Inc., et al. ***Filed: July 21, 2005:***

OPINION

RAWLINSON, Circuit Judge:

This case presents challenges to the district court's postverdict rulings following a jury trial. Because the district court properly resolved the parties' respective motions, we affirm..

I. FACTUAL AND PROCEDURAL BACKGROUND

Plaintiff Mamdouh El-Hakem, who is of Arabic heritage,brought this action against his former employer BJY, Inc., and Gregg Young, BJY's Chief Executive Officer, for employment discrimination, wrongful termination, and failure to pay wages. Claims were made under 42 U.S.C. § 1981; Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, asamended); the Fair Labor Standards Act (29 U.S.C. § 201 *et seq.*); Oregon Revised Statutes § 652.140 *et seq.*; and related state statutes.

El-Hakem's racial discrimination claims stemmed fromYoung's repeated references to El-Hakem as "Manny." Despite El-Hakem's strenuous objections, Young insisted on using the non-Arabic name rather than "Mamdouh," El-Hakems's given name. In Young's expressed view, a "Western"name would increase El-Hakem's chances for success and would be more acceptable to BJY's clientele.

El-Hakem's wage claims were predicated upon assertions that BJY failed to pay El-Hakem regular and

overtime wages during his employment and after his employment with BJY ended, which occurred when BJY closed the office where El- Hakem worked.

After a five-day trial, the jury completed interrogatories on separate special verdict forms for each of the Defendants. The jury found that Young intentionally discriminated against El-Hakem on the basis of his race in violation of 42 U.S.C. § 1981 by creating a hostile work environment, and awarded him $15,000 in compensatory damages and $15,000 in punitive damages. In addition, the jury found that BJY failed to pay El-Hakem regular wages in the amount of $11,051.64 due at the time El-Hakem's employment ended.

The jury found in favor of the Defendants on El-Hakem's remaining claims, including his hostile work environment, wrongful termination and retaliation claims against BJY. Although the jury concluded that El-Hakem's complaints about his unpaid wages were a substantial motivating factorin BJY's decision to terminate him, it also concluded that BJY would have made the same termination decision even if El-Hakem had not complained.

Both Young and El-Hakem moved for judgment as a matter of law. Young contended that he could not be held liable for racial discrimination in violation of § 1981 because his conduct was not race-based. El-Hakem asserted that BJY wasvicariously liable for racial discrimination pursuant to Title VII, and that the "same decision" defense does not apply to a wage-retaliation claim asserted under Oregon's wage protection statutes.

The district court denied Young's motion in its entirety. El-Hakem's motion was granted to the extent he sought to impose vicarious liability upon BJY for racial discrimination, and the district court amended the judgment to reflect BJY's vicarious liability on the racial discrimination

claim. El-Hakem's motion was denied regarding application of the "same decision" defense to his state law wage-retaliation claim.

Each party appealed the adverse portions of the court's post-verdict rulings. Young and BJY also appealed the district court's failure to apportion the attorney's fees awarded to El- Hakem.

II. STANDARDS OF REVIEW

The district court's decision on a motion for a judgment as a matter of law is reviewed *de novo*. *LaLonde v. County of Riverside*, 204 F.3d 947, 959 (9th Cir. 2000). We view the evidence in the light most favorable to the non-moving party, and all reasonable inferences are drawn in that party's favor *Id*. A motion for a judgment as a matter of law is properly granted only if no reasonable juror could find in the nonmoving party's favor. *Sanghvi v. City of Claremont*, 328 F.3d 532, 536 (9th Cir. 2003). A district court's determination that a jury's verdict is internally inconsistent is also reviewed *de novo*. *Norris v. Sysco Corp.*, 191 F.3d 1043, 1047 (9th Cir. 1999).

Attorney fee awards are reviewed for an abuse of discretion. *Corder v. Gates*, 947 F.2d 374, 377 (9th Cir. 1991). A "district court's fee award will be overturned [only] if it is based on an inaccurate view of the law or a clearly erroneous finding of fact." *Id*. (citations omitted). We review the district court's interpretation of state law *de novo*. *Woods v. Graphic Comm.*, 925 F.2d 1195, 1199 (9th Cir. 1991).

III. DISCUSSION

1. The District Court Properly Denied Young's Motion for Judgment as a Matter of Law on the Racial Discrimination Claim

[1] Defendants argue that they could not be held liable

forintentionally discriminating on the basis of race under § 1981, because the name "Manny" is not a racial epithet. We disagree with Defendants' premise. Their contention that actionable race discrimination must be based on physical or "genetically determined characteristics such as skin color" ignores the broad reach of § 1981. In *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 613 (1987), the Supreme Court explained that "a distinctive physiognomy is not essential to qualify for § 1981 protection." Rather, the section was "intended to protect from discrimination identifiable classes of persons who are subjected to intentional discrimination solely because of their ancestry or ethnic characteristics." *Id.*

[2] A group's ethnic characteristics encompass more thanits members' skin color and physical traits. Names are oftena proxy for race and ethnicity. *See Orhorhaghe v. INS*, 38 F.3d 488, 498 (9th Cir. 1994) (recognizing that "discrimination against people who possess surnames identified with particular racial or national groups is discrimination on the basis of race or national origin.") (citation omitted).

In *Manatt v. Bank of America*, 339 F.3d 792, 794-95 (9thCir. 2003), we identified two incidents of racial derogation directed at a Chinese woman. One instance occurred when other employees ridiculed the woman for mispronouncing "Lima," and the other consisted of employees pulling their eyes back with their fingers in mocking imitation of the appearance of Asians. *Id.* at 798. Although the second instance is an example of discrimination directed at a genetically-determined physical trait, the first is not. In the first instance, the coworkers were ridiculing the woman's language and pronunciation rather than a physical characteristic. Thus, Defendants misread *Manatt* when they cite it for the proposition that racial discrimination must be based solely on physical traits.

[3] We also reject Defendants' contention that Young's conduct was not frequent or pervasive enough to create a hostilework environment. It is true that "[c]onduct that is not severe or pervasive enough to create an objectively hostile or

abusive work environment . . . is beyond Title VII's purview." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). It is also correct that this standard also applies to the § 1981 claim at issue in this case, because we evaluate § 1981 claims the same as we do Title VII claims. *See Manatt*, 339 F.3d at 797. However, as the district court noted, "rational jurors could find[that] Young's intentional conduct created a hostile work environment because his conduct was sufficiently pervasive to alter the conditions of Plaintiff's employment and to create a work environment racially hostile to a reasonable Arab." (case citations omitted). "The required level of severity or seriousness varies inversely with the pervasiveness or frequency of the conduct." *Nichols v. Azteca Rest. Enter., Inc.*, 256 F.3d 864, 872 (9th Cir. 2001) (citation and internal quotation marks omitted).

Although Young's conduct may not have been especially severe,1 there was unrefuted evidence of its frequency and pervasiveness. The jury heard testimony that Young continued to use the name "Manny" over El-Hakem's repeated objections. El-Hakem first objected to Young's use of "Manny" in a marketing meeting. Despite El-Hakem's objection, Young insisted on calling him "Manny" in a subsequent telephone conversation and e-mail. Approximately one month later, El-Hakem proposed in an e-mail that Young use Hakem, his last name, if he found Mamdouh difficult to pronounce.

Rather than call him Hakem, Young suggested in his reply e-mail that El-Hakem be called "Hank." El-Hakem objected again. Despite El-Hakem's continued objections, Young persisted in calling El-Hakem "Manny" once a week in the Monday marketing meeting for approximately two months, and in e-mails at least twice a month thereafter. The conduct continued for almost a year, from May, 1999 to April, 2000. Because these incidents were frequent and consistent rather than isolated, a reasonable juror could conclude that El-Hakem's work environment was hostile.

[4] Finally, we disagree with Defendants' contention thatEl-Hakem failed to present evidence of Young's

discriminatory intent. In Defendants' view, there was no evidence of intent because "even if plaintiff felt the name 'Manny' had racial implications, there is no indication Mr. Young felt that way." However, the record is clear that Young intended to discriminate against El-Hakem's Arabic name in favor of a non-Arabic name, first by altering Mamdouh to "Manny" and then by changing Hakem to "Hank." Therefore, there was sufficient evidence of discriminatory intent to support the jury's verdict, and the district court properly denied Young's motion for judgment as a matter of law.

2. The District Court Did Not Err in Reconciling the Verdict

In its special verdict responses, the jury found Young liablefor race discrimination under § 1981 but did not find BJY similarly liable, even though the evidence showed that Young was acting in the course and scope of his employment at all pertinent times. After concluding that the special verdicts were inconsistent, the district court amended the judgment to hold BJY vicariously liable for discrimination.

[5] When confronted by seemingly inconsistent responses to special verdict interrogatories, a trial court has a duty to harmonize those responses whenever possible. *See Gallick v.Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 119 (1963). In doing so, the court "must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and . . .[t]he consistency of the jury verdicts must be considered in light of the judge's instructions to the jury." *Toner ex rel.Toner v. Lederle Labs.*, 828 F.2d 510, 512 (9th Cir. 1987)(citations omitted).

[6] In this case, the district court recognized that its failureto give a requested vicarious liability instruction led to theinconsistent responses from the jury. Because the evidence established that Young was acting in the scope of his employment at all pertinent times, BJY was liable for Young's acts as a matter of law,2 and the district court properly amendedthe judgment to include BJY's vicarious

liability for race discrimination.

Because the jury was not instructed that it must find against BJY if it found against Young, the jury responses could be reconciled by considering the probable effect on the jury of not having the benefit of the correct instructions. The district court reasonably concluded that the only reason the special verdicts were inconsistent was due to the lack ofappropriate instructions. Having concluded that inclusion ofthe vicarious liability instruction would have inevitably resulted in consistent verdicts of liability against both defendants, the district court did not abuse its discretion by amending the judgment to impose vicarious liability upon BJY. *See Westinghouse Elec. Corp. v. General Cir. Break. & Elec. Supply Inc.*, 106 F.3d 894, 901 (9th Cir. 1997) (approving adjustments to the jury verdict in the face of a "flawed instruction").

Defendants also challenge the amount of damages assessed against BJY. The district court concluded that a new trial on the question of damages against BJY was unnecessary because the "jury's finding as to Plaintiff's compensatory and punitive damages for this claim are supported by substantial evidence." The court awarded El-Hakem the same damages against BJY that the jury awarded against Young. Defendants assert that the amount of punitive damages for a corporation and an individual "may be different." Although it is true that punitive damage awards3 *may* be different, Defendants failed to rebut the district court's conclusion that the amount of punitive damages against BJY was supported by substantial evidence presented to the jury.

3. The District Court Did Not Err in Declining to Apportion the Attorney's Fees Awarded to El-Hakem

Defendants contend that the district court should have apportioned the award of attorney's fees between the state law wage claim and the federal discrimination claim, as the

statelaw wage claim was unsuccessful. According to the Defendants, "it is improper from the standpoint of equity and common sense to hold Mr. Young liable for the fees and costs incurred in prosecuting the wage claim."

[7] In deciding whether apportionment is mandated, the court focuses on the time expended by the plaintiff in pursuing each defendant, rather than on relative liability. *Corder*, 947 F.2d at 382. We have upheld district courts' decisions to apportion fees in several cases. *See, e.g., Jones v. Espy*, 10 F.3d 690, 691-92 (9th Cir. 1993); *Woods*, 925 F.2d at 1207; *Southeast Legal Defense Group v. Adams*, 657 F.2d 1118, 1125-26 (9th Cir. 1981). We have held that a court abused its discretion in not apportioning fees "when the time expended by the plaintiff in pursuing each defendant was grossly unequal." *Corder*, 947 F.2d at 383 (citation and emphasis omitted). We have concluded that a court acted within its discretion when fees were apportioned between successful claims and unsuccessful claims. *See Schwarz v. Sec'y of Health & Human Servs.*, 73 F.3d 895, 905 (9th Cir. 1995).

Neither circumstance exists in this case. There was no gross disproportion in the time expended by El-Hakem's counsel as between BJY and Young because the claims against the two defendants were virtually interchangeable. Neither was there a need to apportion the fee award as to the respective claims, because only a small percentage of the total hours expended was attributable to the state law wage claim, a portion of which was successful.4 The district court's conclusion that the state law wage claim "required little in the way of either factual development or legal analysis" is supported by the record, and bolsters the court's decision that apportionment of the fees was not warranted. *See Hensley v. Eckerhart*, 461 U.S. 424, 434-36 (1983) (recognizing the difficulty of "divid[ing] the hours expended on a claim-by-claim basis.").

4. The District Court Properly Denied El-Hakem's Motion for Judgment as a Matter of Law Challenging Application of the "Same Decision" Defense to His

Wage-Retaliation Claim

El-Hakem contends that the district court erred in allowing the Defendants to assert the "same decision" defense to his wage retaliation claim because: (1) the "same decision" defense is inapplicable to a wage retaliation claim under Or. Rev. Stat. § 652.355; and (2) if the defense is applicable, the defendants waived the affirmative defense by failing to raise it in the pretrial order.5

[8] Under § 652.355, a plaintiff must show that an employer discharged him because of the employee's wage claim.6 In *Hardie v. Legacy Health Sys.*, 6 P.3d 531, 536-37. (Or. App. 2000), *partially superseded by statute on other*grounds, the court considered a "mixed motive" discrimination claim under a similar retaliation statute, Or. Rev. Stat § 659.410(1), which makes it unlawful for an employer to retaliate against an employee who invokes the workers' compensation system. The court held that under this section, if an employer denies any discriminatory motive and asserts a nondiscriminatory reason for the plaintiff's termination, then "a plaintiff must be able to show that he or she would not have been fired but for the unlawful discriminatory motive of the employer." *Id.* at 537 (citation and internal quotation marks omitted). Stated differently, the plaintiff must show that the employer would not have made the "same decision" to terminate him in the absence of the discriminatory motive.

[9] The retaliation claim at issue in *Hardie* and El-Hakem's retaliation claim place identical burdens on the plaintiff, both requiring a plaintiff to show he was fired "because of" the employer's retaliatory motive. Therefore, the district court correctly determined that the "same decision" defense is available under § 652.355 just as it is under § 659.410(1).El-Hakem alternatively argues that if the "same decision" defense is available, the Defendants failed to assert it in the pretrial order as required. In response, the Defendants contend that they had no duty to raise the defense in the pretrial order because "the issue is not a

defense, but an aspect of plaintiff's burden of proof."

[10] A pretrial order controls the subsequent course of the action unless modified "upon a showing of good cause." *Zivkovic v. Southern Cal. Edison Co.*, 302 F.3d 1080, 1087 (9thCir. 2002) (citation omitted). Accordingly, a party may not "offer evidence or advance theories at the trial which are not included in the order or which contradict its terms." *United States v. First Nat'l Bank of Circle*, 652 F.2d 882, 886 (9th Cir. 1981) (footnote reference omitted). Because parties have a duty to advance any and all theories in the pretrial order, BJY had a duty to assert its theory that it would have made the same decision to terminate El-Hakem even if a retaliatory motive also existed. BJY's contention that it did not have this duty because El-Hakem has the burden of proof is without merit. A defendant must enumerate its defenses in a pretrial order even if the plaintiff has the burden of proof. *See Southern Cal. Retail Clerks Union v. Bjorklund*, 728 F.2d 1262, 1264 (9th Cir. 1984) (holding, in action to recover trust fund contributions, that defendant failed to preserve his defense that third party was acting as plaintiff's agent.).

[11] Although the pretrial order did not reflect that BJY noticed the "same decision" defense in response to El-Hakem's wage-retaliation claim, notice was given in the pretrial order that BJY advanced the identical "same decision" defense to El-Hakem's federal discrimination claims. Therefore, El-Hakem should have been alerted to, and sufficiently prepared for, BJY's assertion of the defense. BJY's reference to the defense in the pretrial order, albeit in response to a different claim, distinguishes this case from the cases El-Hakem relies on for support. In those cases, defendants failed to include *any* reference to the defense in the pretrial order. *See Northwest Acceptance Corp. v. Lynnwood Equip., Inc.*, 841 F.2d 918, 924 (9th Cir. 1988) (finding defense waived when raised for the first time in reply brief to appellate court); *Southern Cal. Retail Clerks Union*, 728 F.2d at 1264 (concluding that issue was waived where no colorable reference to defense in pretrial order).

[12] The district court had the authority to modify the

pretrial order and implicitly exercised that authority in permitting BJY to advance the "same decision" defense. In the absence of any prejudice to El-Hakem, we cannot say that the district court abused its discretion.

IV. CONCLUSION

The district court properly denied Young's motion for judgment as a matter of law on El-Hakem's intentional discrimination claim. Young's persistent reference to El-Hakem by a racially-motivated nickname supported the jury's finding of discrimination. The court also properly amended the judgment to hold BJY vicariously liable for racial discrimination, and acted within its discretion in declining to apportion the attorney's fees. Finally, the court's consideration of the "same decision" defense was within its discretion and its application of the doctrine was consistent with Oregon law.

AFFIRMED.

Footnotes:

1El-Hakem conceded that Young's conduct was not "severe."

2 Under Title VII, there is a presumption that "an employer is vicariously liable for a hostile environment created by a supervisor." Nichols, 256 F.3d at 876-77. Moreover, the "legal principles guiding a court in a Title VII dispute apply with equal force in a § 1981 action." Manatt, 339 F.3d at 797 (citations omitted). In this case, Young was found liable for creating a hostile work environment under § 1981, and "BJY did not plead, prove, or seek any jury instruction to avoid vicarious liability."

3 In fact, BJY probably benefitted from the court's decision, because punitive damage awards against corporations are usually considerably higher than those awarded against individuals. Dennis P. Stolle et al., The Perceived Fairness of the Psychologist Trial Consultant: An Empirical Investigation, 20 Law & Psychol. Rev. 139, 148-49 (1996).

4 The district court concluded that the bulk of the fees for the wage claim was subsumed in counsel's "General Litigation" billings. See Thurman v. Yellow Freight Sys., Inc., 90 F.3d 1160, 1169 (6th Cir. 1996) (recognizing that "[m]uch of counsel's time will be devoted generally to the litigation as a whole").

5 The district court summarized the facts relevant to the "same decision" defense as follows: In response to the Court's interrogatories, the jury found [that] BJY terminated Plaintiff's employment. Although the jury found Plaintiff's complaints about unpaid wages were a substantial motivating factor in the decision of BJY to terminate Plaintiff's employment, the jury also found BJY would have made the same decision in the absence of Plaintiff's complaints. The jury logically could have based these findings on evidence that BJY ultimately closed its Portland office because Plaintiff, its only employee there, was not licensed to provide the professional services BJY sold to its clients.

6 Section 652.355 provides, in relevant part:

> (1) No employer shall discharge or in any other manner discriminate against any employee because:
>
> (a) The employee has made a wage claim or discussed, inquired about or consulted an attorney or agency about a wage claim.

Or. Rev. Stat. § 652.355.

Appendix 2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MAMDOUH EL-HAKEM, CV 01-663-BR

Plaintiff, OPINION AND ORDER

v. Entered March 29, 2003

BJY INC., a foreign corporation, and GREGG YOUNG, an individual,

Defendants.

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BROWN, Judge.

This matter comes before the Court on Defendant Gregg Young's Motion for Judgment as a Matter of Law and Alternatively a New Trial (#115) and Plaintiff Mamdouh El-Hakem's Motion for Judgment as a Matter of Law and to Amend Judgment or Alternatively for New Trial (#117). FN1

For the reasons that follow, the Court DENIES Defendant Young's Motion. The Court also GRANTS in part that portion of Plaintiff's Motion in which Plaintiff seeks an amended judgment against Defendant BJY, Inc., for its vicarious liability under Title VII for the $15,000 compensatory damages and $15,000 punitive damages awarded to Plaintiff on his § 1981 claim against Young. The Court DENIES the remainder of Plaintiff's Motion.

BACKGROUND

Plaintiff, an Arab male of Egyptian origin, worked for BJY as a structural-plans examiner in Portland, Oregon, from approximately October 7, 1998, through April 7, 2000. Young is the Chief Executive Officer of BJY. During Plaintiff's employment, Young repeatedly addressed Plaintiff, over Plaintiff's objection, by the non-Arabic, "Western" name of "Manny." According to Plaintiff, Young's purpose for this practice was "to make it easier" for BJY's clients to interact with employees who did not have Western-sounding names. Although Young also selected Western names for other BJY employees throughout the country, only Plaintiff objected. Even after Plaintiff complained numerous times, Young persisted in using the name "Manny" to address Plaintiff in e-mails and in telephone conferences instead of using Plaintiff's given Arabic name, "Mamdouh."

Plaintiff worked under the supervision of a licensed structural-plans examiner. After the licensed examiner left the Portland office, however, Plaintiff, who was not licensed, was the only employee working there. Ultimately, BJY closed the Portland office in spring 2000. Before then, Plaintiff complained internally and to Oregon authorities that BJY was not compensating him properly under minimum- and overtime-wage laws. Plaintiff's employment ended shortly thereafter. Plaintiff brought this action against both BJY and Young individually for employment discrimination, wrongful termination, and unpaid wages pursuant to 42 U.S.C. § 1981;

Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e; the Fair Labor Standards Act (FLSA), 29 U.S.C. § 201; and Oregon state law. The Pretrial Order included five claims for hostile work-environment discrimination based on race or religion; three claims for unlawful termination based on race, religion, or retaliation; and five claims for wage-law violations.

After a five-day trial, the jury answered specific interrogatories as to each Defendant. After the Court read the Verdicts to the parties, the Court asked whether the parties had any further inquiry for the jury before the Court received the Verdicts and discharged the jury. The parties did not have any further inquiries and did not object to the Court receiving the Verdicts.

The jury found Young intentionally discriminated against Plaintiff by creating or maintaining a hostile work environment on the basis of Plaintiff's race in violation of § 1981. The jury awarded Plaintiff $15,000 in compensatory damages and $15,000 in punitive damages on this claim. In addition, the jury found BJY failed to pay Plaintiff regular wages in violation of Or. Rev. Stat. § 652.140, *et seq.*, in the amount of $11,051.64 due and owing to Plaintiff at the time his employment ended.

In all other respects, the jury found in favor of Defendants. For example, the jury found BJY did not discriminate against Plaintiff by creating a hostile work environment on the basis of Plaintiff's race or religion. In addition, although the jury concluded BJY terminated Plaintiff's employment, the jury also found Plaintiff's race or religion was not a factor in that decision. Moreover, the jury found BJY would have made the same decision even though the jury also found Plaintiff's complaint that BJY owed him unpaid wages was a substantial motivating factor in terminating Plaintiff. Finally, the jury found Plaintiff was an

exempt employee and, therefore, was not entitled to overtime wages.

Accordingly, the Court entered judgment against Young in the sum of $15,000 compensatory damages and $15,000 punitive damages. The Court also entered judgment against BJY for unpaid regular wages of $11,051.64 and penalties of $6,691.20.

Young now moves for judgment in his favor as a matter of law. He asserts he cannot be held liable for race under 1981 because (1) his conduct was not "racially based," (2) there was no racially-hostile work environment, and (3) his conduct did not affect Plaintiff's right to make and to enforce his employment contract with BJY. Young also contends the jury's separate Verdicts are inconsistent, and, therefore, he moves for a new trial.

Plaintiff also moves for judgment as a matter of law. As noted, Plaintiff prevailed on his § 1981 race discrimination hostile work-environment claim as to Young. Plaintiff asserts, however, he also is entitled to judgment against BJY for the same amount of damages the jury awarded Plaintiff against Young on the § 1981 claim. Even if the jury correctly found BJY was not directly liable to Plaintiff under § 1981, Plaintiff asserts BJY is vicariously liable for these damages pursuant to Title VII.

In addition, Plaintiff seeks judgment as a matter of law on his claim for unpaid overtime and a new trial on the issue of the number of overtime hours he worked. Plaintiff maintains the evidence was insufficient to support either the professional or administrative exemption for payment of overtime wages found by the jury. Plaintiff also seeks judgment as a matter of law on his state law wage-retaliation claim because the "same decision" defense found by the jury does not apply to this claim. Finally, Plaintiff seeks judgment as a matter of law or, in the alternative, a new trial on his

retaliation claim under the FLSA against Young because the jury failed to resolve that claim due to "what appears to be a typographical error in the verdict form."

STANDARDS

Special jury verdicts are governed by Fed. R. Civ. P. 49, which provides in part:

> (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives the right to a trial by jury of the issue so omitted unless before the jury retires the party demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

A motion for judgment as a matter of law is governed by Fed. R. Civ. P. 50, which provides in part:

(b) Renewing Motion for Judgment After Trial;Alternative Motion for New Trial. If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to the jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment-- and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned;

(A) order a new trial, or

(B) direct entry of judgment as a matter of law.

(c) Granting Renewed Motion for Judgment as a Matterof Law; Conditional Rulings; New Trial Motion.

(1) If the renewed motion for judgment as a matter of law is granted, the court shall also rule on the motion for a new trial, if any, by determining whether it should be granted if the judgment is thereafter vacated or reversed, and shall specify the grounds for granting or denying the motion for the new trial. If the motion for a new trial is thus conditionally

granted, the order thereon does not affect the finality of the judgment. In case the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial shall proceed unless the appellate court has otherwise ordered. In case the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial; and if the judgment is reversed on appeal, subsequent proceedings shall be in accordance with the order of the appellate court.

A motion for new trial is governed by Fed. R. Civ. P. 59(a), which provides in part:

> **(a) Grounds.** A new trial may be granted to all or any of the parties and on all or part of the issues
>
> (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; . . . .

The court may grant judgment as a matter of law contrary to a jury's verdict if the evidence viewed in the light most favorable to the nonmoving party is insufficient to support the verdict:

> Judgment as a matter of law is proper if the evidence, construed in the light most favorable to the non-moving party, allows only one reasonable conclusion and that conclusion is contrary to that reached by the jury. Mockler v. Multnomah County, 140 F.3d 808, 815 n.8 (9th Cir. 1998) (internal quotations omitted). The jury's verdict must be affirmed if it is supported by substantial evidence. *Id.* "Substantial evidence is such relevant evidence as reasonable minds might accept as adequate to support a conclusion even if it is possible to draw two inconsistent conclusions from the

evidence." *Gilbrook v. City of Westminster*, 177 F.3d 839, 856 (9th Cir. 1999)(internal quotations and citations omitted).

The court also may grant judgment as a matter of law and, alternatively, a new trial when the court's instructions to the jury were legally insufficient. If a party does not raise an objection to the legal sufficiency of the court's proposed jury instructions before the jury is instructed, however, any objection is waived. *Passantino v. Johnson & Johnson Consumer Prods., Inc.,* 212 F.3d 493, 512 (9th Cir. 2000). *See also* Fed. R. Civ. P. 51. In addition, a party may waive such an objection by failing to request a specific instruction on the particular issue. *E.E.O.C. v. Pape Lift, Inc.*, 115 F.3d 676, 683 (9th Cir. 1997). Finally, the court may grant a new trial if a jury's verdict contains irreconcilable inconsistencies:

> It is certainly true that . . . [when] a jury answers special interrogatories and the answers cannot be reconciled, a new trial must be granted. But it is also true that we do not find inconsistency lightly. Rather:
>
> > We are bound to find the special verdicts consistent if we can do so under a fair reading of them. When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to disregard the jury's verdict and remand the case for a new trial.
>
> *Norris v. Sysco Corp.*, 191 F.3d 1043, 1048 (9th Cir. 1999), *cert. denied*, 528 U.S. 1182 (2000)(internal quotations and citations omitted). When the court invites the parties to consider whether to discharge the jury after the jury has reported its verdict, however, a party must raise any issue concerning possible inconsistencies in the jury's findings before the jury

is excused or risk waiver of the objection. *Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d 1322, 1331 (9th Cir. 1995).

DISCUSSION

I. Plaintiff is entitled to judgment against both Young and BJY on Plaintiff's race-based hostile work-environment claim.

A. Substantial evidence exists to support the jury's Verdict against Young on Plaintiff's § 1981 hostile work-environment claim.

The Court submitted to the jury Plaintiff's § 1981 race-discrimination claims against both BJY and Young. As noted, Plaintiff alleged both BJY and Young violated § 1981 by creating a racially-hostile work environment and/or by terminating Plaintiff's employment because of his race. Although Plaintiff's race-discrimination claims against Young arose only under § 1981, Plaintiff's race-discrimination claims against BJY arose under both § 1981 and Title VII and involved identical factual issues. In addition, Plaintiff's separate Title VII hostile work-environment and unlawful termination claims for discrimination based on Plaintiff's religion applied only to BJY. It was necessary, therefore, to make clear to the jury that (1) Plaintiff's Title VII claims, including the discrimination claims based on religion, did not apply to Young and (2) the same factual issues necessary to resolve Plaintiff's § 1981 claims against BJY also would resolve Plaintiff's Title VII race-based claims against BJY. Accordingly, pursuant to Rule 49(a), the Court used two forms of verdict, one for each Defendant. The Court also directed the jury to answer specific questions tailored to Plaintiff's multiple theories of discrimination.

The jury responded as follows to the Court's interrogatories concerning Plaintiff's claims of race-based hostile work environment and wrongful termination under § 1981 against Young:

Part I. Hostile Work Environment Discrimination Claim

1A. Has Plaintiff proved by a preponderance of the evidence that Defendant Young intentionally discriminated against Plaintiff by creating or maintaining a hostile work environment on the basis of Plaintiff's race?

Yes X No _____

If your answer is "No," proceed to Part 2. If your answer is "Yes," proceed to Question 1B.

1B. What are Plaintiff's damages, if any, for intentional hostile work environment discrimination by Defendant Young?

For emotional distress: $15,000

For punitive damages: $15,000

In Part II of Young's verdict form, the jury responded "No" to the question whether Plaintiff proved Young intentionally caused BJY to terminate Plaintiff's employment. Plaintiff, therefore, prevailed on his § 1981 race discrimination claim against Young only on the hostile work-environment theory.

Young now moves for judgment as a matter of law (and, alternatively, for a new trial) on Plaintiff's § 1981 claim based on a hostile work environment. Young asserts the evidence was insufficient to support any finding that (1) his conduct was racially based, (2) his conduct created a hostile work environment, or (3) his conduct affected Plaintiff's right to make and to enforce his employment contract with BJY. Young made these same arguments at trial.

Viewing the evidence in the light most favorable to Plaintiff, the Court remains convinced rational jurors could find Young's conduct was based on Plaintiff's status as an Arab. The Supreme Court has identified "targets of race discrimination for purposes of Section 1981 include groups that today are considered merely different ethnic or national groups, such as Arabs, Jews, Germans and Italians." *Benigni v. City of Hemet*, 879 F.2d 473, 477-78 (9th Cir. 1988), *reh'g denied,* 882 F.2d 356 (1989)(citing *Saint Francis Coll. v. Al-Khazraji*, 481 U.S. 604, 609-12 (1987)). *See also Pavon v. Swift Transp. Co., Inc.*, 192 F.3d 902, 908 (9th Cir. 1999). When Young persistently addressed Plaintiff, over his objection, by a Western, non-Arabic name rather than Plaintiff's Arabic name in order "to make it easier" for customers of BJY to deal with Plaintiff, Young engaged in conduct that was racial in nature.

The Court also remains satisfied rational jurors could find Young's intentional conduct created a hostile work environment because his conduct was sufficiently pervasive to alter the conditions of Plaintiff's employment and to create a work environment racially hostile to a reasonable Arab. *See Harris v. Forklift Sys.*, Inc., 510 U.S. 17, 21-22 (1993). *See also Ray v. Henderson*, 217 F.3d 1234, 1245 (9th Cir. 2000); *Ellison v. Brady*, 924 F.2d 872, 879-80 (9th Cir. 1991). Young's argument that he never met Plaintiff in person is beside the

point. Moreover, the evidence, viewed in the light most favorable to Plaintiff, does not support Young's contention that he only occasionally addressed Plaintiff as "Manny." In fact, the jury heard evidence that Young 14 -OPINION AND ORDER stubbornly continued to engage in this conduct over Plaintiff's repeated objections.

Young also contends he is entitled to judgment as a matter of law because he cannot be individually liable under § 1981 without privity of contract with Plaintiff. As the Third Circuit noted in its decision in *Al-Khazraji v. Saint Francis College*, however, an officer of a corporation who intentionally infringes on an individual's rights protected under § 1981 is personally liable:

> In particular, directors, officers, and employees of a corporation may become personally liable when they intentionally cause an infringement of rights protected by Section 1981, regardless of whether the corporation may also be held liable. If individuals are personally involved in the discrimination . . . and if they intentionally caused the . . . [infringement of] Section 1981 rights, or if they authorized, directed, or participated in the alleged discriminatory conduct, they may be held liable. 784 F.2d 505, 518 (3d Cir. 1986), *aff'd on other grounds*, 481 U.S. 604 (1987)(citations omitted).

In summary, Young has not offered any persuasive arguments to set aside the jury's specific finding that he discriminated against Plaintiff based on Plaintiff's race in violation of § 1981. The Court, therefore, denies Young's Motion for Judgment as a Matter of Law.

B. The Court erred when it did not instruct the jury that BJY would be vicariously liable to Plaintiff if the jury found against Young on Plaintiff's § 1981 race- discrimination claim.

Although the jury specifically found Young intentionally discriminated against Plaintiff by creating a racially-hostile work environment, the jury answered "No" when asked: "Has Plaintiff proved by a preponderance of the evidence that Defendant BJY, Inc., discriminated against Plaintiff by creating or maintaining a hostile work environment on the basis of Plaintiff's race or religion?"

Young moves alternatively for a new trial. Young asserts the jury's Verdict holding him liable for race-discrimination is inconsistent with the Verdict in which the jury found BJY did not discriminate against him on the basis of race. Young argues the solution to this inconsistency is to vacate the judgment against him. Neither Young nor BJY, however, objected to the Court receiving the Verdicts before the jury was discharged even though the Court gave the parties an opportunity to do so. Young and BJY, therefore, waived any objection they may have had based on inconsistency of the Verdicts. *See Home Indem. Co. v. Lane Powell Moss and Miller*, 43 F.3d at 1331.

Conversely, in Plaintiff's Motion for Judgment as a Matter of Law and to Amend Judgment or Alternatively for New Trial, Plaintiff contends this same inconsistency warrants entry of judgment against BJY based on its vicarious liability pursuant to Title VII for the damages awarded Plaintiff on his § 1981 hostile work-environment claim against Young. Plaintiff emphasizes the only evidence at trial was that Young was acting within the course and

scope of his employment with BJY. The Court agrees. Moreover, Plaintiff requested an instruction to that effect before the Court submitted the case to the jury, but the Court only instructed the jury generally concerning vicarious liability:

> Under the law, a corporation is considered to be a person. It can act only through its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts of its employees, agents, directors, and officers performed within the scope of authority.

Although the jury could have found BJY liable for Young's conduct pursuant to this instruction, the Court did not explicitly direct the jury that it must find against BJY if it found Young liable on either of Plaintiff's § 1981 claims. Accordingly, although Plaintiff did not object to the Court receiving the Verdicts before the Court discharged the jury, the Court finds such an objection was unnecessary to preserve the issue. *See Hammer v. Gross*, 932 F.2d 842, 847 (9th Cir.), *cert. denied*, 502 U.S. 980 (1991). *See also Smith v. Tow Boat Serv. & Mgmt., Inc.*, 66 F.3d 336 (9th Cir. 1995).

When a post-trial motion is based on an alleged inconsistency in verdicts, the court first must determine whether the verdicts are, in fact, inconsistent:

> When faced with a claim that verdicts are inconsistent, the court must search for a reasonable way to read the verdicts as expressing a coherent view of the case, and must exhaust this effort before it is free to

> disregard the jury's verdict and remand the case for a new trial. The consistency of the jury verdicts must be considered in light of the judge's instructions to the jury.

Toner v. Lederle Labs., 828 F.2d 510, 512 (9th Cir. 1987) (citation omitted). The Seventh Amendment "right to a jury trial requires validation of verdicts if at all possible." *Pierce v. S. Pac. Transp. Co.*, 823 F.2d 1366, 1370 (9th Cir. 1987) (citations omitted).

The question is whether the jury's finding that Young discriminated against Plaintiff by creating a hostile work environment because of Plaintiff's race is inconsistent with the jury's answer in favor of BJY on Plaintiff's § 1981 hostile work-environment claim. That question turns on whether Plaintiff's § 1981 claim against Young was subject to the same elements and proof as Plaintiff's race-based Title VII and § 1981 hostile work-environment claims against BJY and whether, in any event, BJY is vicariously liable pursuant to Title VII for Young's conduct in violation of § 1981.

During trial and up to the time of instructing the jury, the Court and counsel explored at length whether Plaintiff's § 1981 claims against Young and BJY were subject to the same elements and proof as Plaintiff's race-based Title VII claims against BJY. To prevail on his § 1981 claims against Young, Plaintiff maintained he only needed to prove the same elements required for his Title VII race-discrimination claims against BJY. Plaintiff relied on Footnote 3 in *Swinton v. Potomac Corp.* to support his contention that his § 1981 claims should be measured by the same standard as his Title VII race-discrimination claims:

> FN3. Though *Ellerth* and *Faragher* involve Title VII, their reasoning applies to cases involving § 1981 and RCW 49.60 et seq. *See Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406, 1412 (9th Cir. 1987) ("An employee may seek relief under both Title VII and section 1981 for racial discrimination in employment. *Lowe [v. City of Monrovia]*, 775 F.2d [998], 1010 [(9th Cir.1986)]. . . . The same standards apply, and facts sufficient to give rise to a Title VII claim are also sufficient for a section 1981 claim. Id."); *see also Nichols v. Azteca Restaurant Enters.*, 256 F.3d 864, 875 n.9 (9th Cir. 2001)(similarity of Title VII and WLAD); *Xieng v. People's Nat'l Bank*, 120 Wash.2d 512, 844 P.2d 389, 392 (1993)(same).

270 F.3d 794, 803 (9th Cir. 2001).

Because Title VII does not apply to individual defendants, however, Defendants argued at trial it would be error to use Title VII standards to instruct the jury on the elements of Plaintiff's § 1981 claims against Young. According to Defendants, Plaintiff had to prove a specific intent to discriminate on the basis of race in order to prevail on his § 1981 claims. Indeed, "[p]roof of intent to discriminate is necessary to establish a violation of [S]ection 1981." *Imagineering, Inc. v. Kiewit Pac. Co.*, 976 F.2d 1303, 1313 (9th Cir. 1992), *cert. denied*, 507 U.S. 1004 (1993). In *Imagineering, Inc.*, the court cited the Supreme Court's decision in *General Building Contractors Ass'n v. Pennsylvania*, 458 U.S. 375, 390-91 (1982), in which the Court explained the historical significance of and the legislative context in which § 1981 was enacted. The Court noted § 1981 prohibited only "purposeful discrimination."

The Court and the parties did not find any direct authority to support the principle that Title VII race-discrimination standards applicable in a § 1981 claim against an employer also control a companion § 1981 claim against an individual defendant. Moreover, neither the Court nor the parties identified any authority that explained whether "purposeful discrimination" under § 1981 required proof of specific intent to discriminate on the basis of race.

Although the parties did not proffer any explicit instruction to address this particular issue, Defendants insisted on a specific-intent instruction. Plaintiff, in turn, maintained a standard Title VII-type instruction was sufficient for his § 1981 claims against Young. The Court, therefore, was left to reconcile whether there was any inconsistency between "purposeful discrimination" in a § 1981 race-discrimination claim against an individual defendant and an employer-defendant's "mere" intent to discriminate in violation of Title VII.

To prevail on Title VII and § 1981 claims, it is well-settled that a plaintiff must show some form of intentional discrimination. *See, e.g., Robinson v. Adams*, 847 F.2d 1315, 1316 (9th Cir. 1987), *cert. denied,* 490 U.S. 1105 (1989); *Craig v. Los Angeles* County, 626 F.2d 659, 668 (9th Cir. 1980), *cert. denied,* 450 U.S. 919 (1981). In addition, the courts seem to equate Title VII with § 1981 for purposes of analysis and instruction concerning a claim against an employer. In light of the legislative purpose underlying § 1981, the fact that Title VII does not apply to an individual defendant, the absence of precedential guidance from the appellate courts, and the risk of unnecessarily confusing the jury, this Court opted in favor of a specific-intent instruction only with respect to Plaintiff's § 1981 claims against Young and did not include a specific-intent instruction for Plaintiff's § 1981 claims against BJY. The Court, therefore, did not

affirmatively require the jury to find against BJY based on vicarious liability if the jury found Plaintiff proved one or both of his § 1981 claims against Young. Accordingly, as to Plaintiff's § 1981 claim based on a hostile work environment, the Court instructed the jury that Plaintiff had to prove by a preponderance of the evidence all of the following elements:

> 1. Plaintiff is a member of a racial minority. (As to this element, I instruct you that the Arab race is a racial minority.)
>
> 2. Defendants subjected Plaintiff to verbal or other conduct of a racial nature by addressing him, after his objection, by a non-Arab, Western name;
>
> 3. the conduct was unwelcome;
>
> 4. the conduct was sufficiently pervasive[2] to alter the conditions of Plaintiff's employment and create a racially hostile or abusive work environment;
>
> 5. Plaintiff perceived the working environment to be abusive or hostile; and
>
> 6. a reasonable Arab man in Plaintiff's circumstances would consider the working environment to be abusive or hostile.

In addition, as to Defendant Gregg Young, Plaintiff must prove Defendant Young acted with a specific intent to discriminate against Plaintiff on the basis of Plaintiff's race.

(Emphasis added.)

As to Plaintiff's § 1981 claim of unlawful termination, the Court instructed the jury that Plaintiff had to prove by a preponderance of the evidence all of the following elements:

1. Plaintiff was discharged by Defendant BJY, Inc., and/or Defendant Young; and

2. Plaintiff's race was a motivating factor in Defendants' decision to discharge Plaintiff.

Again, as to Young, the Court instructed the jury that Plaintiff had to prove Young acted with a specific intent to discriminate against Plaintiff on the basis of Plaintiff's race. As noted, the jury found in favor of BJY on the § 1981 hostile work-environment claim, but the jury also found against Young on the same claim. These Verdicts can be reconciled only if the legal elements of the § 1981 hostile work-environment claim against an individual defendant are different from the elements of an otherwise identical Title VII hostile work-environment claim against an employer. The Court has not found any decisions by other courts to support that conclusion notwithstanding the Court's pragmatic approach to resolve the jury instructions on this question at the conclusion of trial. Accordingly, the Court concludes the Verdicts on Plaintiff's § 1981 hostile work-environment claim are inconsistent and cannot be reconciled on any theory consistent with the evidence and the law.

Plaintiff contends the proper response to this inconsistency is to enter judgment as a matter of law against BJY on the basis of vicarious liability for the hostile work-environment compensatory and punitive damages the jury awarded Plaintiff when the jury found against Young on Plaintiff's § 1981 hostile-work environment claim. The Court agrees.

In *Faragher v. City of Boca Raton*, the Supreme Court held "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." 524 U.S. 775, 777 (1998). *Accord Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998). In *Burrell v. Star Nursery, Inc.*, the Ninth Circuit explained the *Faragher* rule as follows: "[I]f the harassment is actionable and the harasser has supervisory authority over the victim, we presume that the employer is vicariously liable for the harassment." 170 F.3d 951, 956 (9th Cir. 1999). The presumption of vicarious liability may be overcome if the "alleged harassment has not culminated in a tangible employment action" and if the employer can prove both elements of the affirmative defense enunciated in *Faragher*. *Id.* "The *Faragher* affirmative defense requires proof of two elements by a preponderance of the evidence: (a) the employer exercised reasonable care to prevent and correct promptly any . . . [discriminatory] behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *E.E.O.C. v. Dinuba Med.Clinic*, 222 F.3d 580, 587 (9th Cir. 2000)(internal quotations omitted).

In this case, BJY did not plead, prove, or seek any jury instruction to avoid vicarious liability pursuant to *Faragher*. In any event, the evidence indicates only one conclusion: Young, CEO of BJY, at all times acted in the course and scope of his employment. The presumption that BJY is vicariously liable under Title VII for Young's conduct in creating a racially-hostile work environment, therefore, was not overcome. Accordingly, Plaintiff was entitled to have the Court explicitly instruct the jury that it must find BJY vicariously liable for any damages the jury awarded Plaintiff

on his § 1981 claim against Young, but the Court declined to do so.

As noted, "[j]udgment as a matter of law is proper if the evidence, construed in the light most favorable to the nonmoving party, allows only one reasonable conclusion and that conclusion is contrary to the one reached by the jury." *Mockler v. Multnomah County*, 140 F.3d at 815 n.8 (internal quotations and citation omitted). In this case, the Court finds the sole conclusion that can be drawn from the evidence and the jury's finding against Young requires entry of judgment as a matter of law against BJY based on its vicarious liability under Title VII for Young's conduct in creating a racially-hostile work environment. A new trial on the question of damages against BJY, however, is unnecessary because the jury's finding as to Plaintiff's compensatory and punitive damages for this claim are supported by substantial evidence.

Accordingly, the Court finds it erred when it did not instruct the jury that BJY would be vicariously liable to Plaintiff if the jury found against Young on Plaintiff's § 1981 race-discrimination claim. The Court, therefore, grants Plaintiff's Motion of Judgment as a Matter of Law and to Amend Judgment Against BJY, Inc., as to Plaintiff's race-based hostile work-environment claim against BJY and orders an amended judgment to enter against BJY for the same amount in compensatory and punitive damages the jury awarded to Plaintiff on his § 1981 hostile work-environment claim. The Court also denies Young's alternative Motion for New Trial.

II. Substantial evidence exists to support the jury's finding that Plaintiff was an exempt employee and, therefore, was not entitled to overtime wages.

In response to the Court's interrogatories, the jury found Plaintiff proved he worked more than 40 hours per week during his employment with BJY. The jury also found, however, that both Young and BJY proved Plaintiff was an exempt employee and, therefore, was not entitled to overtime wages because Plaintiff was employed "in either an administrative and/or professional capacity" for the relevant period. Plaintiff moves for judgment as a matter of law and asserts the evidence was insufficient for Defendants to have established either exemption. Defendants, on the other hand, maintain the evidence was sufficient to support the jury's finding on either or both exemption. The Court agrees with Defendants. The Court, therefore, denies Plaintiff's Motion on this issue.

III. Oregon law does not preclude the "same decision" defense against Plaintiff's state law wage-retaliation claim.

In response to the Court's interrogatories, the jury found BJY terminated Plaintiff's employment. Although the jury found Plaintiff's complaints about unpaid wages were a substantial motivating factor in the decision of BJY to terminate Plaintiff's employment, the jury also found BJY would have made the same decision in the absence of Plaintiff's complaints. The jury logically could have based these findings on evidence that BJY ultimately closed its Portland office because Plaintiff, its only employee there, was not licensed to provide the professional services BJY sold to its clients.

Plaintiff argues the "same decision" defense does not apply to his retaliation claim brought pursuant to Or. Rev. Stat. § 652.355. The statute provides in part:

(1) No employer shall discharge or in any other

> manner discriminate against any employee *because*:
>
> (a) The employee has made a wage claim or discussed,inquired about or consulted an attorney or agency about a wage claim.

(Emphasis added.)

As noted, the jury found Plaintiff's complaints about unpaid wages were a substantial motivating factor in BJY's decision to terminate Plaintiff's employment. Plaintiff argues the jury's finding means BJY discharged him "because" he made a wage claim in violation of Or. Rev. Stat. § 652.355. Plaintiff reasons, therefore, the "same decision" defense does not apply.

Plaintiff relies on *Brown v. American Property Management Corp.*, 167 Or. App. 53, 1 P.3d 1051 (2000). In *Brown*, the employer argued an issue of fact should have precluded the trial court from entering summary judgment against the employer as to its motive in suspending the plaintiff after he made a wage claim. The employer contended it suspended the plaintiff to avoid future liability rather than to retaliate for the plaintiff's wage claim. In rejecting the employer's position, the Oregon Court of Appeals held the employer's proffered motive was, in fact, consistent with the plaintiff's claim that he was suspended because of his wage claim. The court, therefore, affirmed the trial court's grant of summary judgment in favor of the employer. The court, however, did not analyze the issue in terms of a "same decision" defense. Indeed, this Court has found no Oregon case that addresses this question for purposes of Or. Rev. Stat. § 652.355.

In *Hardie v. Legacy Health System*, however, the

Oregon Court of Appeals explained the proper causation standard to apply in a "mixed motive" employment discrimination case under Oregon law is a "but for" test:

> To prevail in a "mixed motive" claim, a plaintiff must be able to "show that he or she 'would not have been fired but for the unlawful discriminatory motive of the employer. '"We have not further clarified the meaning of the "but for" standard in employment discrimination cases. . . . We have also described the evidentiary standard for employment discrimination claims by using language other than "but for." . . . .[We have] held that the protectedactivity must be a "substantial factor" in the wrongful discharge. . . . [We have] held that anemployer's wrongful purpose must be "a factor that made a difference." The crux of the standard, regardless of which phraseology is attached to it, is whether, in the absence of the discriminatory motive, the employee would have been treated differently.

167 Or. App. 425, 435, 6 P.3d 531 (2000)(citations omitted).

In *Hardie*, the plaintiff alleged her employer discharged her in violation of Or. Rev. Stat. § 659.410(1) because she made a workers' compensation claim. To establish her *prima facie* case for retaliatory discrimination under that statute, the plaintiff was required to "show (1) that the plaintiff invoked the workers' compensation system; (2) that the plaintiff was discriminated against in the tenure, terms or conditions of employment; and (3) that the employer discriminated against the plaintiff in the tenure or terms of employment because he or she invoked the workers'

compensation system." *Id.* at 433.

Plaintiff had to meet the same causation standard in this case to establish his claim of retaliatory discrimination in violation of Or. Rev. Stat. § 652.355. Plaintiff, therefore, had to show he would not have been terminated "but for" the retaliatory motive of BJY. Because BJY proved it would have made the same decision to terminate Plaintiff regardless of any retaliatory motive, Plaintiff necessarily failed to make the required showing. The Court, therefore, denies this part of Plaintiff's Motion.

IV. Plaintiff waived his objection to "what appears to be a typographical error" in the Verdict form concerning Plaintiff's FLSA retaliation claim against Young.

Finally, Plaintiff moves for judgment as a matter of law on his claim against Young for retaliation under the FLSA. Plaintiff asserts the Court erred in its instructions on the Young Verdict form by directing the jury not to answer Questions 3A through 3E. Specifically, the Court's instructions directed the jury to "proceed to Part 4" concerning Plaintiff's claims for unpaid wages and, thus, to bypass Part 3 concerning Plaintiff's wage retaliation claim if the jury determined in Question 2A that Young did not cause BJY to terminate Plaintiff's employment because of Plaintiff's race. Even if Young did not cause BJY to terminate Plaintiff's employment based on Plaintiff's race, however, that fact did not dispose of Plaintiff's claim that Young was liable to Plaintiff as an "employer" on Plaintiff's FLSA wage-retaliation claim. The Young Verdict form, therefore, contained a substantive error.

Plaintiff, nonetheless, waived any objection to this error when he failed to object before the Court submitted the

Young Verdict form to the jury and before the Court received the Verdict and discharged the jury. Before the Court instructed the jury, the Court worked with counsel at length to develop the interrogatory-forms of verdict that would assist the jury in sorting through Plaintiff's numerous, overlapping claims. The Court submitted its proposed forms of verdict to the parties in advance and made appropriate changes and corrections in response to the parties' suggestions. Although the Court regrets its error, Plaintiff had numerous opportunities to discover the error and to bring it to the Court's attention so that it could be corrected while the jury was still available. Having failed to do so, Plaintiff waived his objections to the Verdict form as to this issue.

In any event, the Court concludes the error likely was harmless. As noted, the jury found BJY would have made the same decision to terminate Plaintiff even if Plaintiff's complaints about unpaid wages had not been a factor in that decision. The Court finds, therefore, there is no view of the evidence under which this "same decision" defense would apply to BJY but not to Young. The Court, therefore, denies Plaintiff's Motion on this ground.

CONCLUSION

For these reasons, the Court **DENIES** Defendant Gregg Young's Motion for Judgment as a Matter of Law and Alternatively a New Trial (#115). The Court also **GRANTS in part** that portion of Plaintiff Mamdouh El-Hakem's Motion for Judgment as a Matter of Law and to Amend Judgment or Alternatively for New Trial (#117) in which Plaintiff seeks an amended judgment against Defendant BJY, Inc., for its vicarious liability pursuant to Title VII for the $15,000 compensatory damages and $15,000 punitive damages awarded to Plaintiff on his § 1981 claim against Defendant Young. Accordingly, the Court orders an amended

judgment to enter against Defendant BJY, Inc., consistent with this Opinion and Order. The Court **DENIES** the remainder of Plaintiff's Motion.

IT IS SO ORDERED.

Dated this 19th day of March, 2003.

/s/ Anna J. Brown

ANNA J. BROWN United States District Judge

FN1. BJY, Inc., did not file any post-trial motions, but it joined Young in opposing Plaintiff's Motion, including that part in which Plaintiff seeks judgment as a matter of law against BJY. Also pending are Plaintiff's Motion for Attorney Fees and Costs (#120, #126) and BJY's Bill of Costs (#116). The Court will take these Motions under advisement on this date and will resolve these matters consistent with this Opinion and Order.

FN2 Plaintiff conceded Young's conduct was not "severe," and the parties agreed the Court should instruct the jury only that the conduct must be "pervasive."

APPENDIX 3

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

MAMDOUH EL-HAKEM

Plaintiff,

v. No. CV01-663

BJY, INC., a foreign corporation, and GREGG YOUNG, an individual,

Defendants.

Amended Judgment

This action came on for trial before the Court and a jury, Honorable Anna J. Brown,

District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that plaintiff recover on his Sixth Claim for Unpaid Wages from defendant BJY, Inc. the sum of $11,051.64 and penalties under that same claim in theamount of $6,691.20 plus prejudgment interest on such amounts from April 8, 2000 at the rate of 9 percent per annum, compounded annually.

It is further Ordered and Adjudged that plaintiff recover on his First Claim for Race Discrimination under Section 1981 from defendants Gregg Young and BJY, Inc., the sum of $15,000.00 in general damages and $15,000.00 in

punitive damages, plus interest from entry of judgment in accordance with the rate set forth in 28 U.S.C. § 1961.

Attorney's fees and costs will be considered under timely motions made under Rule 54(d).

Dated this 4th Day of April , 2003.

_s_____

ANNA J. BROWN

DISTRICT COURT JUDGE